MOTION FILED

JAN 28 1972

IN THE

Supreme Court of the United States

October Term, 1970

No. 40 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

and

STATES OF CONNECTICUT, CALIFORNIA, and INDIANA,
Intervening Plaintiffs,

v.

STATES OF NEW YORK, FLORIDA, OREGON and VIRGINIA, and the WESTERN UNION TELEGRAPH COMPANY,
Defendants,

and the

STATE OF ARIZONA,
Intervening Defendant.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF AMERICAN EXPRESS COMPANY

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MOTION OF AMERICAN EXPRESS COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

American Express Company ("Amexco") respectfully moves this Court for leave to file the accompanying brief as *amicus curiae.* The Attorneys General of the States of Arizona, California, Connecticut, Florida, Indiana, Oregon, Pennsylvania and Virginia, and the General Counsel for the defendant Western Union Telegraph Company ("Western Union") have consented to the filing of this brief. The Attorney General of the State of New York has refused such consent.

Statement of Interest

Amexco, one of the largest issuers of travelers checks and commercial money orders in the nation, has supported since the beginning of this proceeding,[1] and for a number of years prior thereto, the promulgation of a single rule respecting the escheat of abandoned property which could be applied with fairness and ease to the widest possible range of commercial instruments for the transfer of money. The Special Master granted Amexco's motion for leave to file its brief *amicus curiae* in the proceedings before him, but noted at a conference on November 12, 1970:

> ". . . American Express could not ask for answers to its peculiar problems in the [instant case], except insofar as the rules applicable to telegraphic money orders would, by implication, apply to travelers checks. However, he stated that he thought it appropriate to consider the American Express travelers checks and any other similar instruments, insofar as the disposition of unclaimed funds from such transactions shed light on a proper disposition of unclaimed funds arising from Western Union telegraphic money orders." *Report,* p. 4.

For the reasons stated below this Court should grant Amexco's motion for leave to file the accompanying brief as *amicus curiae.*

I. Adoption of the Report of the Special Master without modification will result in serious injustices to issuers of commercial instruments and to the states involved.

Amexco urges that the conclusions and suggested decree of the Special Master be rejected by this Court because (1) they restrict the range of effect of the decision to telegraphic money orders issued by Western Union, (2) they portend future litigation in this Court respecting other forms of

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[1] *Report of the Special Master dated November, 1971* ("*Report*"), pp. 4-5.

instruments where specific addresses of the purchasers are not kept as a matter of business practice, such as travelers checks and commercial money orders, (3) they may promote needless changes in corporate domiciles of issuers of commercial instruments to avoid the impact of escheat laws and (4) they result in a distortion of the principles of *Texas* v. *New Jersey*, 379 U.S. 674 (1965).

In its brief to the Special Master, Amexco urged the adoption of an escheat rule based upon the factually sound presumption that the residence of the sender of the telegraphic money order will be deemed to be in the state of origin of the transaction, until proved otherwise. The Special Master erroneously refused to consider this rule on its merits because he believed that its adoption would be inconsistent with the constitutional principles underlying *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). This Court should have the opportunity to examine Amexco's objections to the *Report* and consider fully the impact of such a potentially limiting decision.

II. Amexco's financial interest in the decision of this case is substantial.

Amexco's immediate financial interest in the outcome of this case can be highlighted in monetary terms. Prior to the decision in *Texas* v. *New Jersey* in 1965, Amexco paid New York the entire proceeds (with two exceptions[2]) of its travelers checks and money orders deemed abandoned under New York's Abandoned Property Law,[3] regardless of the laws of the place where such instruments were sold. After that decision, Amexco began withholding from New York

[2] Proceeds from abandoned instruments sold in New York and Pennsylvania were not paid to New York because of litigation against Amexco in these states.

[3] N.Y. Abandoned Property Law, § 1309 (McKinney's 1969).

the proceeds of all travelers checks sold in any other state which had an applicable escheat statute. As a result, Amexco has withheld the sum of $2,221,200[4] representing proceeds of travelers checks deemed abandoned after 15 years pending a decision as to whether the state where the instrument was sold or New York, the state of Amexco's domicile, is entitled to the fund. With respect to the proceeds of travelers checks sold in New York and in any state which has no applicable statute, Amexco has continued to pay such funds to the State of New York.

In addition, Amexco began withholding from New York the proceeds of certain money orders deemed abandoned after 7 years. In 1969 when New York amended Section 1309 of its Abandoned Property Law to adopt the place of sale or purchase test for money orders sold on and after January 1, 1958[5], Amexco began paying the states, such as California, which had an applicable statute (see Appendix A), the proceeds of money orders sold within their borders on and after January 1, 1958.

III. Amexco is uniquely situated to advocate a fair and practical approach to the problem of which states should be allowed to escheat abandoned commercial instruments.

As one of the largest issuers of travelers checks and money orders in the world, Amexco has had many years of

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[4] This amount, which represents the proceeds of abandoned travelers checks sold in approximately 30 states (computed as of the latest available date), is subject to increase as additional travelers checks become abandoned each year and is subject to decrease as checks outstanding more than 15 years are cashed and redeemed by Amexco.

[5] N.Y. Abandoned Property Law, § 1309(3); (McKinney's 1970) as amended by L. 1969 c. 1114, § 3, effective May 27, 1969. This statute was amended again in 1970 by L. 1970, c. 706, eff. May 12, 1970.

practical experience with abandoned property laws. In *Texas* v. *New Jersey, supra,* this Court in an analogous situation granted the Life Insurance Association of America ("Association") permission to file its brief *amicus curiae* in this Court, and it appears from reading the Association's brief that the Association made a significant contribution to the ultimate decision. Amexco respectfully submits that it, like the Association in *Texas* v. *New Jersey,* can make a useful contribution to the decision in the instant case.

In summary, Amexco submits that this Court should grant Amexco's motion in order to consider its arguments in favor of adopting the rule advocated by the Commonwealth of Pennsylvania to the effect that the residence of the sender of a Western Union money order will be deemed to be in the state of purchase of that service, until proved otherwise by another state. The adoption of this rule will make this Court's decision apply with equity to the widest range of commercial instruments. Not only is the rule Amexco supports in accord with the underlying rationale of *Texas* v. *New Jersey,* but it will be fair to all the states, easy to administer and compatible with modern concepts of escheat jurisdiction.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF AMERICAN EXPRESS COMPANY

Summary of Argument

American Express Company ("Amexco") respectfully submits that the Court should reject the conclusions and recommended decree as set forth in the Report of the Special Master dated November, 1971 ("*Report*") because

they are based upon a misapplication of constitutional law to escheat jurisdiction and upon a misconception of the principles underlying *Texas* v. *New Jersey,* 379 U.S. 674 (1965). The Court should adopt the state of purchase rule advocated by the Commonwealth of Pennsylvania because (1) it is in accord with *Texas* v. *New Jersey* and *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U.S. 71 (1961); (2) it can be applied equitably to a wide range of commercial instruments and (3) it is fair to all the states, easy to administer and in accord with modern concepts of escheat jurisdiction.

General Statement

Amexco is concerned that because the Western Union Telegraph Company ("Western Union") telegraphic money order service has certain features peculiar only to it, a rule could evolve from the instant case which could lead to further and wasteful litigation among the states and could be injurious to both their interests and the interests of Amexco and other issuers of commercial instruments. Therefore the salient features of Amexco's travelers check and money order services are compared below with the telegraphic money order service of Western Union.

A. *Western Union:*

This statement assumes for the purpose of illustration that the purchaser of the service (the sender) wants to send money from a place in State A to a person (the payee) in State B. The sender goes to a Western Union office in State A, fills out an application and gives it to the company clerk together with the money to be sent and the charges for sending it. Although the application has spaces for the

sender's and the payee's names and addresses, in many cases the sender omits his address and the precise street address of the payee. *See Report,* Findings of Fact No. 7, p. 9; Stipulation of Facts, pp. 4-5. The sender gets a receipt and a telegraphic message is transmitted to the company's office in State B nearest to the payee directing that office to pay the money order to the payee. No instrument is issued during any part of the above-described step in the transaction. The payee is then notified by the State B office and, upon properly identifying himself, is given a negotiable draft which he can either endorse and cash at once or keep for use in the future. If, within 72 hours, the payee cannot be located for delivery of the notice or fails to call for the draft, the office of destination in State B notifies the sending office in State A. The sending office then attempts to notify the sender of the failure to deliver and, if successful in locating the sender, makes a refund to him by means of a negotiable draft which may be either cashed immediately or kept for use in the future.[1] Stipulation of Facts, p. 6; *Report,* p. 7. If the sending office is unsuccessful in locating the sender, the funds are held by Western Union to be disposed of ultimately as abandoned property.

B. *American Express Company:*

Amexco's travelers check and money order services present a much simpler situation (involving fewer relevant jurisdictions for escheat purposes) than the Western Union service. Since by its nature a travelers check[2] is designed for use in the future, there is no payee when Amexco or its

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[1] *See Western Union Telegraph Co.* v. *Pennsylvania, supra.*

[2] Amexco's travelers checks are issued in denominations of $10, $20, $50, $100 and $500.

selling agent (most of which are banks) delivers the instrument to the purchaser. In the case of a travelers check, Amexco or its selling agent usually requires the purchaser to fill out an application form which Amexco keeps for three years. In many cases the purchaser does not insert his address in the space provided on the application. However, Amexco or the selling agent inserts the serial numbers of the checks on the application at the time of sale and since Amexco has a computer record of the office or agent to which all its checks have been distributed for sale, Amexco knows, as the application forms are returned, the place of sale of its travelers checks.

When a commercial money order is sold, Amexco or its selling agent inserts the amount involved on the money order form and hands it to the purchaser, who fills in the payee's name at his convenience. Consequently, Amexco has no record of the name or address of the payee; nor of the purchaser as well.[3] However, the serial number of each money order distributed by Amexco is listed on a sales report which the selling agent completes by inserting the amount involved at the time of sale. This report is then returned to Amexco on a weekly or other regular basis with the net proceeds of the agent's money order sales.

Thus, from the information taken from the forms and reports[4] above mentioned and transcribed onto computer tapes, Amexco can readily determine the state in which each travelers check and money order is sold.

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[3] *See* footnote 10, p. 27 of the Stipulation of Facts.

[4] Amexco's paper records are ultimately destroyed in accordance with the Company's record retention and disposal procedures.

ARGUMENT

I. This Court Should Adopt the Rebuttable Presumption That Where no Specific Address is Available, the Residence of the Purchaser of a Money Order or Other Instrument for the Transmission of Money Will be Deemed to be in the State of Purchase of the Service as Shown by the Books and Records of the Issuer of such Instrument, Until Proved Otherwise.

The Special Master Erred in Foreclosing Factual Consideration of the Purchase-Residence Presumption.

The only question presented by this case is "which State has jurisdiction to take title to certain abandoned intangible personal property through escheat". *Texas* v. *New Jersey, supra,* 675.

Amexco asserts that the best answer to this question is to adopt tLe last known address or residence rule of *Texas* v. *New Jersey* and the presumption that the residence of the purchaser of a check, draft or money order or other instrument for the transmission of money will be deemed to be in the state of purchase of the instrument or service involved. Although the Special Master concedes that the domicile of the purchaser and the place or office of purchase will, "[F]requently, perhaps usually", coincide, *Report,* p. 18, he rejects the presumption and the state of purchase rule based thereon because he sees the choice of such rule as cutting off the individual owner's rights in the property. As he stated on page 18 of the *Report:*

> "The principle [sic] difficulty with this solution is that it gives rise to a serious question as to the legality of cutting off or impairing an individual's property rights by an *in rem* proceeding in the state of origin. *This is stretching the reasoning of Texas* v. *New Jersey to a perhaps unreasonable limit."* (Emphasis added)

Again in footnote number 14 on pages 19 and 20 of the *Report,* he states:

> "Pennsylvania alleges in a Supplemental Memorandum at pages 1 and 2 that the issue of constitutionality is not involved in the present proceeding. *The Special Master believes that the validity of the taking from the viewpoint of the former owners must be a factor in choosing among possible takers.*" (Emphasis added)

The Special Master rejected the state of purchase rule because he confused the requirement of due notice to the owner of the property with the issue of which state has the right to escheat the property involved. This confusion is evident in the following statement from pages 15 and 16 of the *Report:*

> "It can be argued that since in custodial taking only the right to hold and use the money will be shifted from Western Union to a State the interests of the prior owners are not affected. Even in the case of mere custodial taking the property interests of the claimants are vitally affected. Possession is a very real element of ownership. *Moreover, this is the time, if ever, that they will receive notice and an opportunity to be heard. After a custodial taking there is no indication that a State will undertake further proceedings and therefore the owners will practically be divested of their interests.*" (Emphasis added)

A reading of the statutes listed in Appendix A annexed hereto, wherein notice by publication to the owners is required whenever the states invoke their escheat laws, makes it abundantly clear that the position taken by the Special Master is erroneous.

Contrary to the Special Master's conclusion, this case does not involve the cutting off of property rights of the individual owner in such a manner as to invoke the rule of *Pennoyer* v. *Neff*, 95 U.S. 714 (1877). *Cf. Connecticut Mutual Life Insurance Co., et al.* v. *Moore, Comptroller of the State of New York*, 333 U.S. 541, 547 (1947). **The issue for decision here is only which state has *the superior power* to invoke its escheat laws.** As the Supreme Court said in *Texas* v. *New Jersey, supra*, on this very question:

> "We realize that this case could have been resolved otherwise, for the issue here is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic. It is fundamentally a question of ease of administration and of equity. We believe that the rule we adopt is the fairest, is easy to apply and in the long run will be the most generally acceptable to all the States." 379 U.S. 674, 683.

See Western Union v. *Pennsylvania, supra.*

Having raised a constitutional issue where none existed, the Special Master erred in foreclosing consideration of the state of purchase rule on its merits. In fact, the effect of the Special Master's decision is to distribute escheats to the state of corporate domicile which has no rational connection with the residence of the owner. Thus, the result of his recommended decision is to make it all the more certain as a practical matter that the owner, who is more than likely to reside in some other state, will miss seeing publication of the notice of escheat when the state of corporate domicile proceeds to take possession of the individual items in the fund.

Since federal constitutional considerations are not involved in this case, Amexco urges this Court to adopt the state of purchase rule supported by the Commonwealth of Pennsylvania and most of the other states in this proceeding. This rule is that the residence of the purchaser of a

money order or travelers check will be deemed to be in the state of purchase of the instrument or service as shown by the books and records of the issuer or supplier of the instrument or service, until proved otherwise.

II. Adoption of the Purchase-Residence Presumption is Factually Sound and in Accord with Texas v. New Jersey.

In *Texas* v. *New Jersey, supra,* this Court held that the right to escheat intangible obligations of the types involved in that case should be accorded to the state of the creditor's last known address as shown by the debtor's books and records. The rationale of the Court's decision, in its own words, was "to distribute escheats among the States in the proportion of the commercial activities of their residents" 379 U.S. 674, 681. The Court then went on to hold that where there is no address on the books and records of the debtor, the state of corporate domicile of the debtor could escheat the property, and that it could also escheat the property if the state of the last known address did not have an applicable escheat statute. In both the latter situations, the escheating state would be allowed to keep the property until some other state came forward with proof that it had a superior right to escheat; i.e., proof that the last known address of the creditor was within its borders and that its law made provision for escheat of such property.

In *Texas* v. *New Jersey,* the likelihood that the debtor would not have the addresses of the creditors of such items as corporate dividend checks, employee paychecks and refunds of payroll deductions and checks payable to suppliers of goods and services (the type of intangible personal property involved in that case) was practically nil. Accordingly, this Court could anticipate that the effect of its decision would be that the state of last known address would have the superior right to escheat most of the property involved in that case and that the state of corporate domicile

would escheat only a very small proportion of such property in those relatively few instances where a last known address was not available or where the state of last known address did not have an applicable escheat law. Amexco is concerned that because a last known address for a significant proportion of Western Union money orders can be ascertained from that company's books and records (although with the expenditure of considerable time and money), this Court might apply the rule of *Texas* v. *New Jersey,* without the purchase-residence presumption, on the theory that the state of corporate domicile would only be empowered to escheat those Western Union money orders where no address was furnished by the sender. *Infra,* p. 16. But Amexco desires to emphasize to the Court that there are also many situations where the use of addresses is not a necessary concomitant to the relationship between the parties and accordingly addresses are not kept as a matter of business practice. These range from Western Union telegraphic money orders and Amexco's travelers checks, where a substantial percentage of senders do not supply their addresses, to Amexco's money orders, to bus tokens, to refunds on tickets and to many other types of cash purchases, where no addresses at all are available. The gist of our argument is that by adopting the rebuttable presumption which Amexco is advocating, the Court can follow the primary rule of last known address of *Texas* v. *New Jersey* with fairness and can accomplish the important result in another large category of cases of distributing escheats among the states in proportion to the commercial activities of their residents.

As this Court recognized in *Texas* v. *New Jersey,* the rule of last known address is itself a legal presumption that the residence of the owner of the abandoned property is in the state of last known address. If it is reasonable to

presume that the residence of the owner of the abandoned property of the kind involved in *Texas* v. *New Jersey* is in the state of last known address until proved otherwise, it is also reasonable to presume (as demonstrated below) that the residence of the owner of a telegraphic or commercial money order or travelers check is in the state where he purchased the instrument or service involved.

Since the issuers of travelers checks and money orders maintain computer records of the offices and agents to which their instruments are distributed and where they are sold, such issuers know the place of sale and therefore the state of sale of each of their travelers checks and money orders. Amexco submits that most people buy travelers checks and money orders locally, in the same area where they live and work.[5] In the case of travelers checks, they are usually sold by or through banks and since it can be proved that people tend to bank where they reside,[6] it fol-

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[5] Amexco requested the parties to stipulate certain facts as to the purchasers of its travelers checks and money orders and it was prepared to submit evidence that people tend to buy these instruments where they reside. This request was objected to by one of the parties and therefore the proof was not included in the stipulation.

[6] A number of recent Federal Reserve Bank surveys support the conclusion that people tend to bank where they reside. R. Bowers, "Businesses, Households, and Their Banks", (Federal Reserve Bank of Philadelphia 1969); G. Kaufman, "Customers View Bank Markets and Services: A Survey of Elkhart, Indiana", (Federal Reserve Bank of Chicago 1967); G. Kaufman, "Business Firms and Households View Commercial Banks: A Survey of Appleton, Wisconsin", (Federal Reserve Bank of Chicago 1967); L. Stiles, "Businesses View Banking Services: A Survey of Cedar Rapids, Iowa" (Federal Reserve Bank of Chicago 1967); R. Gelder, G. Budzieka, "Banking Market Determination—The Case of Central Nassau County" (Federal Reserve Bank of New York 1970). The common denominator of these surveys is the proposition that "the demand for the services of commercial banks tends to be highly localized." Bowers, *supra*. *See United States* v. *Phillipsburg National Bank & Trust Co., et al.*, 399 U.S. 356 (1970).

lows that the residence of purchasers of travelers checks will usually be in the state of purchase.

In the case of commercial money orders, Amexco submits that they are used for the most part to pay bills by persons who do not have checking accounts and therefore they are bought at outlets near the purchaser's home, or where he works or where he buys his groceries. Consequently, since the issuers of such instruments have records showing the place of purchase, the books and records of the issuer afford a means of determining the state of purchase of the individual travelers checks and money orders.

In the evidence submitted to the Special Master Western Union showed that out of 2,951 escheatable transactions surveyed for the year 1963, the address of the sender was given in 1,740 instances as the same state as the state in which the application originated; in 145 instances the address of the sender was given as being in a different state from where the application originated, and in the balance of 1,066 instances the sender's address was not given. In other words, of those instances where addresses were given, 93% resided in the state where the transaction originated. There is, therefore, a rational factual basis in the evidence submitted to the Court for the presumption that in the absence of proof to the contrary the state of residence of the purchaser of a Western Union money order is the same as the state where the service was sold.

Despite the fact that little proof has been offered and accepted in this proceeding as to who are the actual purchasers of Western Union money orders, Amexco submits that most personal services, from banking to groceries, are purchased locally, by residents of the particular state where the service is obtained and that from a pragmatic point of

view the burden of proving the contrary should be on the person asserting the contrary. Furthermore, any exceptions to the presumption, as noted by the Special Master in footnote 7 on page 11 and on page 18 of the *Report,* are practically dispelled as *de minimis* by the Special Master himself since the *Report* concedes that the office of purchase and the domicile of the purchaser "[F]requently, perhaps usually," coincide. In any event, the very purpose of a presumption is to economize factual investigation by presuming a fact to be true when there is a demonstrable basis for doing so. For example, in *Texas* v. *New Jersey,* this Court reasoned that since in a large number of abandoned dividend cases the corporate debtor's records reflected creditors' addresses, it could adopt the last known address test. The presumption that the residence of a dividend creditor accords with the last known address of such creditor appeared to the Court to be a reasonable one. Furthermore, the Court noted that exceptions to the presumption would undoubtedly cancel each other out:

> "And by using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified. It may well be that some addresses left by vanished creditors will be in States other than those in which they lived at the time the obligation arose or at the time of the escheat. But such situations probably will be the exception, and any errors thus created, if indeed they could be called errors, probably will tend to a large extent to cancel each other out." 379 U.S. 674, 681.

Similarly, Amexco urges here that this Court should adopt the rebuttable presumption that the residence of the purchaser of a Western Union money order be deemed

to be in the state of purchase. This presumption is in full accord with the last known address concept of *Texas* v. *New Jersey* and would, in addition, carry out with the greatest possible fidelity the mandate of that case to distribute escheats equitably among the states. Furthermore, the presumption forms the basis for those statutes which have adopted Section 2(c) of the Revised Uniform Disposition of Unclaimed Property Act.[7] 9A U.L.A. (1967 Supp.). Section 2(c) provides the following test for escheat of commercial instruments:

> "(c) Any sum payable on checks certified in this state or on written instruments issued in this state on which a banking or financial organization or business association is directly liable, including, by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks, . . ."

In the Commissioner's Note on the criteria for the presumption of abandonment of the various categories of property specified in Sections 2(a) through 2(d) of the Uniform Act the following statement appears:

> "In each instance the jurisdictional test for presumption of abandonment within the enacting state bears direct relationship to events taking place within that state, e.g., deposits 'made in this state,' funds 'paid in this state,' written instruments 'issued in this state,' property removed from safe deposit boxes 'in this

[7] *See* Revised Uniform Disposition of Unclaimed Property Act drafted by the National Conference of Commissioners on Uniform State Laws and approved by it and recommended for enactment in all the states at its annual conference meeting at Montreal, Canada, July 30–August 5, 1966; approved by the American Bar Association at its meeting in Montreal, Canada, August 9, 1966.

> state.' These qualifications are explicitly included both for the legal reason that there must be a jurisdictional basis for the claiming of the property within the state, and also for the practical reason that the presence of the events within the state means that the convenience of various parties in interest will be best served in this way.''

The parties referred to are the purchasers of the instruments or services involved and the state of purchase. Implicit in the choice of such jurisdictional tests is the assumption that most of the purchasers will be residents of the state in which the purchases are made.

Finally, the states of California, Indiana, North Carolina and Pennsylvania have made the purchase-residence presumption explicit in the abandoned property laws of those states.[8]

Amexco respectfully submits that the statutory presumptions referred to above carry out the purpose underlying the rule in *Texas* v. *New Jersey* and have a rational basis in fact. Failure to adopt the purchase-residence presumption would have the effect of invalidating the laws of the plaintiff Pennsylvania, North Carolina and intervening plaintiffs California and Indiana and casting serious doubt as to the validity of the several state laws which embody § 2(c) of the Uniform Act. This Court should not invalidate such a large body of state legislation without extremely good cause for doing so, and none has been shown in this case.

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[8] California C.C.P. § 1511 (West Supp. 1970); Burns Anno. Ind. St. § 51-704(d) (Supp. 1970); North Carolina G.S. Ch. 116A § 116A-4.1(a) (1971); Pennsylvania, Act 74 (1971 New Laws p. 371 (CCH 1971)).

III. The State of Purchase Rule is Fair to all the States, is Easy to Administer, and Accords With Modern Concepts of Escheat Jurisdiction.

The result in monetary terms of adopting the state of purchase rule is that escheats will be distributed in accordance with the commercial activities of presumed residents of the state in which the transaction originated. The state of purchase test also avoids the arbitrariness inherent in the adoption of the New York or corporate domicile rule which would, in effect, be the rule adopted for a substantial number of transactions if the *Report* is approved. That rule has no meaningful connection with the transaction involving the instrument presumed to be abandoned. In fact, the Court has recognized this important failing and has rejected the rule more than once because:

> "... in deciding a question which should be determined primarily on principles of fairness, it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." *Texas* v. *New Jersey, supra,* 680.

Cf. Connecticut Mutual Life Insurance Co. v. *Moore, supra.* The corporate domicile rule must remain a secondary rule so long as there is a rational way of finding the residence of creditors. Thus, in order to achieve the greatest degree of fairness consistent with the complexities of this case, the Court should adopt the state of purchase rule advocated by Pennsylvania.[9]

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[9] Presumably, the state of corporate domicile of the debtor would still have secondary jurisdiction to escheat the property if there was no way of establishing from the books and records the state in which the transaction originated or if the state of purchase did not have an applicable escheat statute.

It should also be noted that the problem of windfalls to tourist states would be avoided by having the escheat jurisdiction allied as closely as possible to people's homes, not their vacation spots.

As to ease of administration, adoption of the state of purchase rule will result in the avoidance of wasteful litigation in the future and the monumental administrative burdens which will confront Amexco and other issuers in record keeping alone. As indicated above, Amexco has no way of knowing the addresses of the payees of its travelers checks and money orders and in the case of travelers checks it would be physically impossible to sort out the millions of application forms to find the names and addresses on those forms which represent checks still outstanding after the abandonment period had elapsed. And this assumes that the purchaser supplied an address in the first place. Adoption of the purchase-residence presumption would obviate the need for additional state record-keeping laws for escheat purposes which could be a severe burden on interstate commerce. *See In re Debs,* 158 U.S. 564 (1895). No other rule suggested in this case can achieve such ease of administration. In addition, the presumption would avoid the administrative morass likely to be encountered when dealing with such entities as Western Union which is the successor by consolidation or merger to 34 separate issuers of postal telegraphic money orders, each of which was incorporated in a different state. Stipulation, p. 3.

Finally, it should be noted that adoption of the state of purchase rule accords with the most modern and widely accepted concepts of escheat jurisdiction. Thirty-five states have adopted abandoned property laws which may be con-

strued to include travelers checks and money orders within their scope, *see* Appendix A, and of those, sixteen states expressly employ the jurisdictional test of place of issue or sale. *See* Appendix B. This is the rule which Amexco is urging here and which is the test employed in Section 2(c) of the Revised Uniform Disposition of Unclaimed Property Act. The same test was also adopted by New York with respect to money orders sold on and after January 1, 1958. As noted above, four states—including the principal plaintiff here—have codified the purchase-residence presumption in their escheat statutes.

Conclusion

The practical effect of adopting the *Report's* suggested decree will be to elevate the corporate domicile rule to primary status with respect to a substantial portion of Western Union money orders and, perhaps, all Amexco travelers checks and money orders. As pointed out above, the corporate domicile rule is purely arbitrary in terms of the actual residence of the owners of abandoned commercial instruments. Furthermore, the corporate domicile rule will be more difficult to administer and will be unfair to the vast majority of states.

The sounder course for this Court is to adopt the rebuttable presumption that the residence of a purchaser of a money order will be deemed to be in the state where the money order was purchased. This presumption is both factually sound and legally compatible with the principles of *Texas* v. *New Jersey*.

For the foregoing reasons, Amexco respectfully urges that this Court hold that the state of purchase be accorded

primary jurisdiction to escheat proceeds from commercial instruments for the transmission of money which have been deemed abandoned under the laws of the state of purchase of such instruments.

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January 27, 1972

APPENDIX A

Alabama—Act 63, Laws 1971, House Bill 68, First Special Session

Arizona—A.R.S. § 44-351-378 (1967)

California—C.C.P. § 1500 et seq. (West Supp. 1970)

Connecticut—C.6.5.A. §§ 3-56a et seq. (1969)

Delaware—House Bill 468, 1971 New Laws, p. 357

Florida—F.S.A. § 717.01–.30 (1969)

Idaho—I.C. §§ 14-501-532 (Supp. 1969)

Illinois—S.H.A. Ch. 141 §§ 101-146 (1964)

Indiana—Burns Anno. Ind. St. §§ 51-701-743 (Supp. 1970)

Iowa—I.C.A. §§ 556.1–.29 (Supp. 1970)

Kentucky—K.R.S. §§ 393.010-.990 (1970)

Louisiana—LSA-R.S. 9:151-156 (1965)

Maryland—Anno. Code of Md., Art. 95C, §§ 1-26 (Supp. 1969)

Massachusetts—Anno. Laws of Mass., ch. 200A, § 1-17 (1969)

Michigan—M.C.L.A. §§ 567.11-.76 (1967)

Minnesota—M.S.A. §§ 345.31-.60 (Supp. 1970)

Montana—R.C.M. §§ 67-2201-2230 (1970)

Nebraska—Laws of Nebraska, Vol. 2, Ch. 611 (1969)

New Hampshire—R.S.A. 471-A:1-28 (1968)

New Jersey—N.J.S.A. 2A:37-11—37-44 (Supp. 1970)

New Mexico—N.M.S.A. §§ 22-22-1—22-29 (Supp. 1969)

New York—N.Y. Abandoned Property Law, § 1309 (McKinney's Supp. 1970)

APPENDIX A

(cont.)

North Carolina—G.S. Ch. 116A (1971)

Oklahoma—60 Okl. St. Ann. §§ 651-687 (Supp. 1970)

Oregon—O.R.S. §§ 98.302-.436 (1969)

Pennsylvania—Act 74 (1971 New Laws pp. 368 et seq. (CCH 1971))

Rhode Island—G.L. § 33-21-11—21-40 (1969)

South Carolina—House Bill 1057, ratification no. 562, Laws 1971

Texas—Vernon's Ann. Civ. St. Art. 3272a (1968)

Utah—U.C.A. §§ 78-44-1—44-29 (Supp. 1969)

Vermont—7A V.S.A. §§ 27-1208—1236 (1967)

Virginia—Code of Virginia §§ 55-210.1-.210.29 (1969)

Washington—RCWA 63.28.070-63.28.920 (1966)

West Virginia—W. Va. Code §§ 36-8-1—36-8-31 (Supp. 1970)

Wisconsin—W.S.A. §§ 177.01-.30 (Supp. 1970)

APPENDIX B

Alabama—Act 63, Laws 1971

California—C.C.P. § 1513(c) (West Supp. 1970)

Indiana—Burns Anno. Ind. St. § 51-704(d) (Supp. 1970)

Iowa—I.C.A. § 556.2 3. (Supp. 1970)

Maryland—Anno. Code of Md., Art. 95C, § 2(c) (1969)

Minnesota—M.S.A. § 345.32(c) (Supp. 1970)

Montana—R.C.M. § 67-2202(c) (1970)

Nebraska—Laws of Nebraska, Vol. 2, Ch. 611, § 2(c) (1969)

New Mexico—N.M.S.A. § 22-22-3C (Supp. 1969)

North Carolina—G.S. § 116A-4.1

Oregon—O.R.S. § 98.306(3) (1969)

Pennsylvania—Act 74 § 3(2)(iii) (1971 New Laws p. 371 (CCH 1971))

Rhode Island—G.L. § 33-21-12(c) (1969)

South Carolina—House Bill 1057 § 14(B)(3), Laws 1971

West Virginia—W. Va. Code § 36-8-2(c) (Supp. 1970)

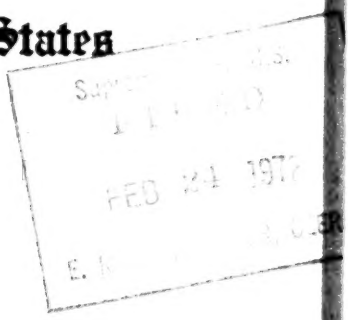
Wisconsin—W.S.A. § 177.02(3) (Supp. 1970)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 40 Original



COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

and

STATE OF CONNECTICUT,

Intervenor-Plaintiff,

vs.

STATE OF NEW YORK, ET AL,

Defendants.

BRIEF IN SUPPORT OF EXCEPTIONS OF DEFENDANT STATE OF FLORIDA TO REPORT OF SPECIAL MASTER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 40 Original

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

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STATE OF CONNECTICUT,

Intervenor-Plaintiff,

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Defendants.

BRIEF IN SUPPORT OF EXCEPTIONS OF DEFENDANT STATE OF FLORIDA TO REPORT OF SPECIAL MASTER

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EXCEPTIONS ARGUED

1. The Special Master has concluded that the issue in this case is controlled by constitutional considerations, contrary to the decision of this Court in Texas v. New Jersey that "the issue here is not controlled by. . . constitutional provisions or by past decisions . . . ." 379 U. S. 674, 683.

2. The Special Master has improperly concluded that a custodial taking by the state shown on the debtor's records as the place for payment or purchase would unlawfully impair the individual creditor's property rights, when such a taking protects those rights more fully than any of the alternative claims asserted in this case.

3. In concluding that the custodial claim to unclaimed money order funds by the state of original destination or payment is cut off by the sender's contract right to refund, the Special Master overlooks the fact that the only funds involved in this proceeding are those which cannot be refunded and which became and remained unclaimed from the time the obligation to the original payee accrued.

4. In concluding that the place designated on debtor's records for payment of money order funds does not constitute a creditor's address according to the debtor's books, within the rule of Texas v. New Jersey, supra, the Special Master has construed that decision to require a technically complete address supplied by the creditor to establish a factual foundation for a finding of legal residence, when the decision instead is based on a rule of equity and expedience and a presumption of residence which in the absence of contrary evidence is adequately supported by a debtor's record of the address at which payment is to be made to a creditor.

ARGUMENT

The defendant State of Florida respectfully submits that the Supreme Court should reject the recommended decree as set forth in the Report of the Special Master dated November, 1971, because it is based upon a misconception of constitutional law as applied to custodial escheat jurisdiction and upon a misapplication of the decision of this Court in Texas v. New Jersey, 379 U. S. 674 (1965).

The jurisdictional effect of such statutes as the Florida statute governing disposition of unclaimed property, Chapter 717, F.S., attached as an exhibit to this defendant's answer herein, has been expressly considered by this Court. The opinion in Security Savings Bank v. California, 263 U. S. 282, 44 S. Ct. 108, 68 L. Ed. 301, 31 A.L.R. 391, states that in the enforcement of a similar California statute "the state does not seek to enforce any claim against [the depositor]. It seeks to have the deposit transferred" to state custody. See also Anderson National Bank v. Luckett, 321 U. S. 233; Standard Oil Co. v. New Jersey, 341 U. S. 428.

The cases appear to be consistent in regarding escheat proceedings as in rem actions in which constitutional requirements are met by actual service of process on the debtor. Certainly in the case of custodial proceedings, such as those under the uniform act applied by many of the states involved in this case, the only jurisdiction exercised is that over the fund for payment of the debt. This would appear to be the reason for the clear pronounce-

ment of this Court in Texas v. New Jersey, supra, that "the issue here is not controlled by . . . constitutional provisions or by past decisions" as to jurisdiction over intangibles. 379 U. S. 674, 683.

The rule applied in the Texas case, to the extent that it recognizes secondary escheat rights by the state of debtor domicile, as well as the alternative which the court held to be more rational, necessarily rests on the assumption that jurisdiction in such proceedings is based on service on the debtor, whether that service is accomplished in the state of domicile or some other state. In distributing escheat rights among such states based on creditor contact, however, this Court in the Texas opinion expressly abandoned the "technical legal concept of residence and domicile." 379 U. S. p. 680.

This defendant believes that the Report of the Special Master departs from both the letter and the spirit of the ruling in the Texas case insofar as the report concludes that a debtor's books must show a specific and complete address supplied by the creditor. As a matter of fact, the various forms and exhibits contained in the stipulated record show that the absence of a specific address for either the sender or sendee in money order transactions results necessarily from the sender's failure to specify a residence or address in addition to the place at which the money order is purchased or payable. Identification of the place of payment and purchase on the debtor's records does, however, constitute a showing of a creditor's address in general terms.

Clearly the purpose of this Court in adopting in the Texas case a standard of "creditor's last known address as shown by the debtor's books," was not to facilitate notice to the creditor, nor was it based on any assumption that the debtor's records proved the creditor's residence or domicile. Instead the Court in that case, as well as the Master's Report in this case, recognizes that the place in which these transactions occur will coincide, at least proportionally, with actual creditor residence, which forms a fairer basis for escheat distribution than does corporate debtor domicile. As a matter of fact, if this Court should choose to consider the evidence rejected by the Master as to Western Union's analysis of 1963 transactions, this material will show that less than two percent of the money order purchase forms affirmatively show an address different from the state in which the transactions occurred.

The present controversy does involve a further refinement of the principle enunciated in the Texas case, because of the nature of the money order obligations here involved. The purchase of a money order, however, clearly creates an obligation due and owing to the payee or sendee. The nature of that obligation was considered by this Court in Western Union Telegraph Co. v. Pennsylvania, 368 U. S. 71, 82 S. Ct. 199, 7 L. Ed. 2d 139.

The money order conditions reflected by the exhibits in this cause, including the provision for cancellation and refund to the sender, are of course an essential and integral part of the contract required by the tariff

regulations filed by Western Union with federal regulatory authorities. These conditions fix the obligations of the parties. Western Union Tel. Co. v. Priester, 276 U. S. 252, 72 L. Ed. 555, 48 S. Ct. 243; Western Union Tel. Co. v. Esteve Bros. & Co., 256 U. S. 566, 65 L. Ed. 1094, 41 S. Ct. 584. In administering its laws, however, Florida does not seek to determine rights between the money order sender and sendee which would be governed by the contract provision. The state instead will continue to hold the property for the account of the person entitled to same, and merely seeks to enforce its custodial rights as to property which became unclaimed within this state.

CONCLUSION

For the reasons stated herein, as well as those more fully set forth in briefs previously filed in this proceeding, the Court is urged to reject the recommendation in the Report of the Special Master. In summary, the defendant State of Florida recognizes the desirability of disposing of this case by a rule that will be administratively feasible and have wide application, and contends that this result will be accomplished by adhering to the rule of the Texas case that the state entitled to escheat is that of the last known address of the creditor according to the debtor's records, and by concluding that the address specified by a debtor's records for payment to a creditor constitutes the creditor's last known address in the absence of conflicting proof. Recognition of escheat rights in the state of destination specified by such records as the place of payment to a money order sendee-payee accords with that rule. Although the application of the rule to bearer instruments (which do not name a payee or place of payment) is not directly presented upon the record in this case, the only debtor record of the creditor or payee's address in those instances would appear to be the place of issue. Escheat at that point would therefore be consistent with this defendant's position in this case.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970
No. 40 Original

COMMONWEALTH OF PENNSYLVANIA,
Plaintiff

and

STATE OF CONNECTICUT,
Intervenor-Plaintiff,

vs.

STATE OF NEW YORK, ET AL,
Defendants

PROOF OF SERVICE

I, Winifred L. Wentworth, Assistant Attorney General of the State of Florida, hereby certify that I am one of the attorneys for the defendant, State of Florida, that I am a member of the Bar of the Supreme Court of the United States, and that on the 23rd day of February, 1972, I served copies of the foregoing Brief in Support of Exceptions of Defendant State of Florida to Report of Special Master, on each of the parties by depositing such copies in a United States Post Office, addressed as follows:

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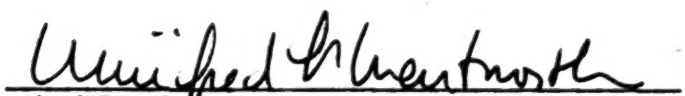

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 40 Original

Supreme Court, U.S.
FILED
FEB 25 1972
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COMMONWEALTH OF PENNSYLVANIA,
Plaintiff,

and

STATES OF CONNECTICUT, CALIFORNIA and INDIANA,
Intervening Plaintiffs,

v.

STATES OF NEW YORK, FLORIDA, OREGON and VIRGINIA, and THE WESTERN UNION TELEGRAPH COMPANY,
Defendants,

and the

STATE OF ARIZONA,
Intervening Defendant.

BRIEF OF DEFENDANT NEW YORK IN SUPPORT OF REPORT OF SPECIAL MASTER

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IN THE

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No. 40 Original

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

and

STATES OF CONNECTICUT, CALIFORNIA and INDIANA,

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STATES OF NEW YORK, FLORIDA, OREGON and VIRGINIA, and THE WESTERN UNION TELEGRAPH COMPANY,

Defendants,

and the

STATE OF ARIZONA,

Intervening Defendant.

BRIEF OF DEFENDANT NEW YORK IN SUPPORT OF REPORT OF SPECIAL MASTER

Preliminary Statement

The question before this Court is which States are entitled to take certain unclaimed monies paid to Western Union Telegraph Company ("Western Union") for the purchase of money orders on or before December 31, 1962

and still held by that company. The total is alleged to constitute approximately $1,500,000 (Complaint ¶ 4, 17; Report of the Special Master ("Report"), November, 1971, p. 2).

The underlying facts which gave rise to Western Union's possession of these funds are set forth at length in the Stipulation of Facts agreed to by all parties in this action, and summarized in the Master's Report (Report pp. 6-9). The agreed upon facts disclose that the funds in question are now held by Western Union on account of money orders purchased from the Company on or before December 31, 1962. The funds so held fall into 3 categories. In some cases, the funds represent negotiable drafts delivered in payment of, or as a refund for, money order purchases which were never presented and therefore never paid. In some cases, the funds represent money orders and refunds which were underpaid through error and where attempts to pay the balance were unsuccessful. In the remaining cases, apparently constituting the majority of those involved herein, the funds represent instances where payment (cash or draft) was not made to the sendee and Western Union did not issue a refund draft to the sender (Stipulation, p. 11, ¶ 21). Western Union's records of unclaimed money orders involve approximately 200,000 money order applications and about 300,000 ledger record entries. The Company's books and records do not designate any person as a "creditor" or as a "person to whom the money is owing". The ledger entries do not contain any reference to last known addresses of the sender or sendee. (Stipulation, ¶ 14, Exhibits 16-21)

The Special Master's Report

The Special Master recommended that this Court's formula, enunciated in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), "for the escheat or custodial taking of intangible

claims such as ordinary debts should be applied to unpaid telegraphic money orders". (Report p. 2)

The Special Master found that the sender is the "creditor" when payment (by cash or draft) cannot be made to the sendee within the 72 hour limit (part of the terms of the contract) and the contract has therefore been cancelled, and that the sendee is the creditor when a draft has been issued to him but not cashed (Report p. 17). The Master then concluded (Report pp. 20-21):

> "Any sum now held by Western Union unclaimed for the period of time prescribed by the applicable State statutes may be escheated or taken into custody by the State in which the records of Western Union placed the address of the creditor, whether that creditor be the payee of an unpaid draft, the sender of a money order entitled to a refund, or an individual whose claim has been underpaid through error. Still following the formula of *Texas* v. *New Jersey,* if no address is contained in the records of Western Union, or if the State in which the address of the creditor falls has no applicable escheat law, then the right to escheat or take custody shall be in the domiciliary State of the debtor, in this case, New York."

The Special Master expressed "doubts" as to the constitutionality of the departures from *Texas* v. *New Jersey* advocated by the other parties. His recommendations, however, were not dependent upon such grounds, but upon the rationale expressed in the *Texas* decision. The Special Master asserted:

> "These doubts as to the constitutionality of the alternative formulas for escheat support the conclusion that the simple and workable formula established by the Court in *Texas* v. *New Jersey* should be followed with respect to telegraphic money orders which are here involved. As in the case of the obligations in

that case, this rule presents an easily administered standard preventing multiple claims and giving all parties a fixed rule on which they can rely."

New York's Position

The rule announced in *Texas* v. *New Jersey,* 379 U.S. 674 (1965) was intended to apply to all types of abandoned intangible obligations. The very essence of the holding was that each abandoned property case should not have to be decided on the basis of its particular facts. Each case should not require the Court to, "devise new rules of law to apply to ever-developing new categories of facts", 379 U.S. at 679. The special exceptions sought by the other states would undermine that purpose. Accordingly, New York respectfully urges this Court to adopt the Special Master's recommended decree based upon his conclusion that the rule of *Texas* v. *New Jersey* should be applied to the escheat or custodial taking of these abandoned money order funds.

The Positions of the Other Parties

The "Pennsylvania" Position

Pennsylvania takes exception to the Special Master's Report and asserts that the formula set forth in *Texas* v. *New Jersey* governing "ordinary debts" cannot be applied to telegraphic money orders (Pennsylvania, Exceptions p. 1).

Pennsylvania argues that Western Union "does not require the purchaser to fill in his address" on his application for a money order (Pennsylvania, Exceptions p. 1), "never makes records showing the address of the sender". (Pennsylvania, Exceptions p. 4), and therefore the rule that should be applied in the "money order transaction

where payment has not been effected nor refund made is that the State of origin" is entitled to escheat or take custody of the unclaimed amounts (Pennsylvania, Exceptions p. 2). Pennsylvania also proposes that if the State of origin cannot be determined from the records of the Company then the State of Western Union's domicile should take (Pennsylvania, Exceptions, pp. 2, 7-8).*

Pennsylvania, accordingly, explicitly states that the formula in *Texas* v. *New Jersey, supra,* should be confined to intangibles such as "ordinary debts" (Pennsylvania, Exceptions p. 1). It asserts that a different rule should be adopted where the transaction is of the type where the "obligor does not make entries upon its books and records showing the address of the obligee", in which event the only State entitled would be "the State of origin of the transaction" (Pennsylvania, Exceptions p. 8).

The following States have supported or adopted Pennsylvania's position (California, Brief and Motion p. 1; Connecticut, Exceptions pp. 1-2, Motion p. 4; Indiana, Exceptions pp. 4-5, Motion pp. 1-2; Oregon, Answer pp. 2-3, Brief p. 5; Virginia, Answer pp. 1-4; New Jersey, *Brief Amicus Curiae* p. 5; See Report p. 13 where the Special Master outlines the positions of these States).

The American Express Company ("Amexco") essentially supports Pennsylvania's position. Like Western Union it does so on the ground that it does not maintain records of the purchaser's address and that a requirement to do so would be an unnecessary burden upon it. (Amexco, Brief p. 21)

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* The Special Master understood Pennsylvania's position to have receded from the above so that it no longer claims amounts where drafts were issued and the records of Western Union show an address for the payee in a State which is different from the State of origin (Report, pp. 10-11).

The "Florida" Position

Florida takes exception to the Special Master's Report and maintains that the State of the sendee should be entitled to take or hold the funds in question (Florida, Exceptions p. 2). Arizona has taken the position that the State of destination should prevail and apparently recognizes the right of the State of the payee's last known address to take where this address is known (Arizona, Answer p. 6; See Report p. 13).

ARGUMENT

The rule established in *Texas* v. *New Jersey* was intended to apply to all types of abandoned intangible obligations. It was not intended to be subject to change in particular circumstances.

In 1965, with the stated intention of settling the issue "once and for all", this Court announced a "clear rule which will govern all types of [abandoned] intangible obligations . . . and to which all States may refer with confidence." *Texas* v. *New Jersey,* 379 U.S. 674, 678 (1965). In establishing this rule, the Court sought to avoid a test which would require each escheat case to be decided "on the basis of its particular facts" or require the Court to "devise new rules of law to apply to ever-developing new categories of facts". 379 U.S. at 679. The Court concluded that the rule it adopted "is the fairest, is easy to apply and in the long run will be the most generally acceptable to all the States". 379 U.S. at 683.

Barely five years after the decision in *Texas* v. *New Jersey,* and despite this Court's unequivocal statement that it was establishing a rule applicable to "all types of [abandoned] intangible obligations", in order to avoid the necessity of deciding each escheat case on its facts, Pennsylvania brought this action to graft an exception on the *Texas* rule.

New York maintains that *Texas* v. *New Jersey* disposed of the issues here presented and that a special exception in relation to money orders would undermine the primary purpose of the Court in that case—to provide an all-encompassing rule which could be relied upon by States and debtors alike, while safeguarding the interests of owners (creditors).

A. The Modification of the *Texas* v. *New Jersey* Rule Proposed by Pennsylvania

As noted above, Pennsylvania in its Exceptions clearly seeks the formulation of a distinct rule where "the company does not keep records of the last known address" in addition to the rule for "ordinary debts" (Pennsylvania Exceptions p. 1). Amexco explicitly seeks to establish a distinct rule for issuers of certain "commercial instruments" while at the same time asserting that telegraphic money orders embrace certain features "peculiar only to it" (Amexco, Brief *Amicus Curiae* p. 7).

The formulation of a new and different rule in addition to that for "ordinary debts" is predicated by these parties upon the conclusion that addresses of creditors are characteristically not available in the instant situations. However, while the parties herein have not disputed (as to the instant funds received by Western Union over a period in excess of 30 years, and still held by it) that it is "not feasible to determine the last known address of the creditor from the books of Western Union" (New York, Answer p. 4) there are an undetermined number of applications in which such information is available (Stipulation of Facts pp. 5-6; Amexco, *supra*, p. 9).

In a highly mobile society where trade even on the simplest levels is largely consummated through adjustments of individuals' various credit balances, i.e., through the exchange of "intangible" rights to property, a considerable incidence of failure to promptly exercise such

rights is a factor of some economic significance. This unclaimed property may not be recoverable by owners if adequate records are not maintained.*

In addition, unless adequate record keeping practices are utilized, it will not, as a practical matter, be possible for States to ascertain the amounts of funds actually left unclaimed and being used by holders who have no equitable interest in property inadvertently left with them. Indeed, to the extent records are incomplete or destroyed the way may be paved to write-off such amounts as profits.

In sum, the facts of this case present no basis for carving out the proposed Pennsylvania exception. The *Texas* rule is easily applied to the funds held by Western Union. Of equal importance, continued adherence to this rule will avoid setting a precedent suggesting to States the utility of proposing exceptions favorable to them whenever the facts of a particular case vary in any manner from those in *Texas* v. *New Jersey*.

B. The Exception to the Rule Proposed by Florida

Florida excepts to the Special Master's Report on the following grounds (Florida, Exceptions p. 2):

> "(4) In concluding that the place designated on debtor's records for payment of money order funds does not constitute a creditor's address according to the debtor's books, within the rule of *Texas* v. *New Jersey*, supra, the Special Master has construed that decision to require a technically complete address supplied by the creditor to establish a factual foundation for a finding of legal residence, when the decision

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* The interests of owners (creditors) in this situation are protected under the New York Abandoned Property Law since it is custodial only and no statute of limitations can be invoked by the State to preclude an owner's right to claim and receive previously unclaimed property.

> instead is based on a rule of equity and expedience and a presumption of residence which in the absence of contrary evidence is adequately supported by a debtor's record of the address at which payment is to be made to a creditor."

Florida, therefore argues first that the "creditor" is and remains the "sendee" until a draft is issued, and second that the place designated as the destination of the money order should be assumed to be the State of this creditor's address.

This argument is contrary to the stipulated facts in this case. If the paying office cannot locate the sendee, or after notice the sendee refuses a draft or does not appear to obtain one, or for any other reason the paying office cannot effect payment to the sendee, then after 72 hours (or other specified period) the money order is cancelled under the terms of the order by the paying office, requiring a refund to the sender (Stipulation at p. 8, ¶ 14 and Exhibits 11-14). Therefore, by the terms of the money order and in actual practice Western Union "cancels" unpaid or undelivered money orders. Following cancellation, the "creditor" is the sender, and not the sendee as Florida contends.

Florida's further contention that the State of destination of the money order should be presumed to be the last known address of the creditor (as defined by Florida) faces the same difficulties with which the converse presumption advocated by Pennsylvania is confronted.* This second aspect of Florida's argument therefore involves, as does

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* Where no draft is issued to the sendee, Florida's claim as the State of destination is particularly tenuous. It is well known that Florida is a "vacation" State. At the very least, a substantial number of Florida "sendees" are residents of other States merely travelling in Florida. Accordingly, when a money order destined for Florida is cancelled, Florida in most cases will have no relationship with the sendee other than his temporary presence.

Pennsylvania's principal argument, the carving out of an exception from the rule laid down in *Texas* based on the contention that in *Texas* the debtor had records from which creditors' addresses could be ascertained. It is argued by Pennsylvania and Amexco that this determinative factor is not present in the instant situation.*

This contention that *Texas* depended upon the existence of last known addresses, is groundless. Both the opinion in *Texas* v. *New Jersey* and the Master's Report (Report pp. 8-12) on which it was based are devoid of any statement as to how many creditors' last known addresses were shown by the debtor's books and records, much less contain any statement that as to "most" of the debts the creditors' last known addresses were shown. It was therefore quite impossible for the Court to have grounded its decision on the "fact of maintenance of such records".

What is clear is that the Court was fully aware that with respect to portions of four of the eight categories of "debts" involved in *Texas* there were creditors "some of whom had no last known address indicated", 379 U.S. at 675-76, fn. 4. With this fact in mind, the Court laid down

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* Amexco argues also that the place of purchase should be presumed to be the place of the creditor's address. In support of this presumption, it discusses a 1963 survey (Amexco, *supra* p. 16) which was objected to when offered into evidence (Transcript, p. 9) as hearsay and incompetent, and not admitted into evidence by the Special Master (Report pp. 5-6) as immaterial. It may be noted that "1963" is not a year included in the instant litigation and that the period in question, ending with December, 1962, included the War years with its extraordinary mobility among members of the armed services and others who presumably made frequent use of telegraphic money order services. In addition, Amexco cites various publications (Brief *Amicus Curiae,* p. 15) pertaining to "banking" matters. Without considering the specifics of these factual assertions, which are not in evidence, it appears tenuous at best to presume that banking practices can be assimilated to telegraphic money orders or with traveler's checks. Further, no documentation is necessary to establish that mobility has become a way of life in the United States and this fact has given rise to many problems in adjusting to a federal system.

a rule applicable to "all" abandoned intangible obligations, making specific provision for those obligations where the creditor's last address was unknown. Moreover, when this Court decided *Texas* v. *New Jersey,* in 1965 it had already confronted these factual issues in *Western Union Telegraph Co.* v. *Pennsylvania,* 368 U.S. 71 in 1961, and therefore was aware of the instant facts when it formulated the unqualified *Texas* rule for intangibles of all kinds.

In this regard, it should be noted that *Texas* v. *New Jersey* involved a wide variety of intangibles such as uncashed checks for wages, reimbursements, goods and services, shareholder dividends and minor obligations; unclaimed mineral proceeds and payroll deductions; and undelivered fractional stock certificates. In short, *Texas* v. *New Jersey* concerned the types of intangible business obligations common, in one facet or another, to a multitude of business operations.

In reality, Pennsylvania's and Florida's contentions are nothing more than that in this case there are larger percentages of unknown last addresses than there were in *Texas* and that this fact justifies an exception to the rule. This is precisely what this Court said was to be avoided, that is, a decision in each case based on its "particular facts" or the creation of "new rules of law to apply to ever-developing new categories of facts". Moreover, if different rules were to be formulated depending on which debtors kept records of last known addresses and which did not, endless litigation would ensue to determine in each case the proper category for each holder of unclaimed property—depending upon whether its records essentially contained this information.

In the long run, in the very limited instances where records of creditor's addresses are not available escheats "will tend [to be] distribute[d] . . . among the States in the proportion of the commercial activities of their residents". Errors in distribution, "if indeed they could be

errors, probably will tend to a large extent to cancel each other out". 379 U.S. at 681.

Moreover, it is within the power of Pennsylvania and other States to correct this situation with little cost to Western Union. The Company's "money order application form" has a blank space for the "sender's address". (See Exhibit 2 to Stipulation). States can require Western Union to maintain adequate records of the addresses of senders. The only change necessary in Western Union's record keeping would be the addition in their "ledgers" of a column showing "sender's address". (See Stipulation at p. 14, ¶ 26). On the other hand, Pennsylvania's position herein may in effect discourage maintenance of such records.

C. The Excepting Parties In Effect Advocate A Return to the "Contacts" Criterion Which This Court Has Repudiated.

The effect of the positions of the excepting parties and Amexco in advocating a criterion for escheat or custodial holding based upon the place of the original "transaction" or place of "purchase" is to apply a form of "contacts" criterion.

In the instant case Pennsylvania asserts the predominant right of the state where the transaction or purchase was initially effected. In another fact situation, however, a different "contact" may be urged, or issue may be drawn as to the state where in fact the "transaction" or "purchase" occurred. Contemporary business practices continuously involve interstate transactions and purchases. To retread the long road to such a "contacts" theory is to invite endless litigation.

Texas v. *New Jersey* is unequivocal in this respect:

> "The 'contacts' test as applied in this field is not really any workable test at all—it is simply a phrase

> suggesting that this Court should examine the circumstances surrounding each particular item of escheatable property on its own peculiar facts and then try to make a difficult, often quite subjective, decision as to which State's claim to those pennies or dollars seems stronger than another's * * *. The uncertainty of any test which would require us in effect to either decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts, might in the end create so much uncertainty and threaten so much expensive litigation that the states might find that they would lose more in litigation expenses than they might gain in escheats." 379 U.S. at p. 679

As a logical consequence, the Court has refused to adopt any rule which would result in its treating this subject on a case-by-case basis:

> "Moreover, application of the rule Pennsylvania suggests would raise in every case the sometimes difficult question of where a company's 'main office' or 'principal place of business' or whatever it might be designated is located. Similar uncertainties would result if we were to attempt in each case to determine the State in which the debt was created and allow it to escheat. Any rule leaving so much for decision on a case-by-case basis should not be adopted unless none is available which is more certain and yet still fair". 379 U.S. at 680

In establishing the rule in *Texas* v. *New Jersey,* this Court was fully aware that the "case could have been resolved otherwise". The Court recognized that it was "fundamentally a question of ease of administration and of equity", and concluded that the rule it adopted "is the fairest, is easy to apply and in the long run will be the most generally acceptable to all the States." 379 U.S. at 683

The concern for ease of administration and equity dictated, in the Court's view, that the question of which State should take abandoned intangible obligations be

> "settled once and for all by a clear rule which will govern all types of intangible obligations . . . and to which all States may refer with confidence."* 379 U.S. at 678

Moreover, in repudiating any "contacts" criterion in *Texas* this Court acted upon the basis of preceding decisions which had initiated a direction away from a place of "transaction" theory to one premised upon the location of either the creditor or debtor. While in *Connecticut Mutual Life Insurance Co. et al.* v. *Moore,* 333 U.S. 541 (1947) the Court did not deal with potential opposing claims by different states it premised its decision on the location of the "owner". On the other hand, the *Standard Oil Co.* v. *New Jersey,* 341 U.S. 428 (1951) decision was based on the domicile of the "debtor". Accordingly, these decisions logically implied an ultimate rule which takes account of the continuing relation of either the creditor or debtor or both with a particular state, as opposed to a rule based upon the vagaries and transitory character of the place of "transaction".

Further, this Court in *Texas* in arriving at the conclusion that it had settled the matter "once and for all" observed, "In some respects the claim of Pennsylvania, where Sun's principal offices are located, is more persuasive, since this State is probably foremost in giving the benefits of its

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* At another point, the Court stated: "in other words in both situations the State of corporate domicile should be allowed to cut off the claims of private persons only, retaining the property for itself only until some other State comes forward with proof that it has a superior right to escheat. Such a solution for these problems, likely to arise with comparative infrequency, seems to us conducive to needed certainty and we therefore adopt it." 379 U.S. at 682

economy and laws to the company whose business activities made the intangible property come into existence". 379 U.S. at p. 680 In this context, it should be noted that New York is not only the State of corporate domicile but is the situs of the principal place of business of Western Union, the place where its executive offices are located, where its books of accounts are maintained, where the meetings of the Board of Directors take place and where its management and fiscal policies are determined. (Stipulation, p. 1, ¶ 1). Moreover, as noted by this Court in *Western Union* v. *Pennsylvania,* 368 U.S. 71, 78 (1961), the New York Statute, Abandoned Property Law, § 1309, is a custodial and not an escheat statute, "leaving the way clear for all claimants to bring action to recover them at any time * * *." New York has no statute of limitations on claims by rightful owners to abandoned funds or property held by its State Comptroller. Abandoned Property Law § 1404; *Matter of New York University* (State Comptroller), 271 App. Div. 131, 63 N.Y.S. 2d 556, aff'd 296 N.Y. 913, 73 N.E. 2d 36 (1947).

State legislation governing unclaimed property has not evolved in any uniform manner. In adopting the *Texas* rule with respect to unclaimed property and conflicting state claims, this Court did not create the necessity for more State legislation than would have been required by other rules. Such conforming legislation is not a problematical matter once a definite rule is established.

In summary, the eroding exceptions proposed to the rule adopted by this Court "with a unique tone of finalty"* in *Texas* v. *New Jersey,* should be rejected. Any other determination would be tantamount to a reversion to the "contacts" test which was rejected by this Court in *Texas* v. *New Jersey.*

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* Sentell, "Escheat Unclaimed Property, and the Supreme Court", 17 Western Reserve Law Review 50, 78 (1965).

Conclusion

The rules announced in *Texas* v. *New Jersey*, are applicable to the abandoned funds held by Western Union in this case. Each of the proposed exceptions to the rule should be rejected. The abandoned money order funds held by Western Union should be disposed of as recommended in the Special Master's Report, pursuant to the rules adopted by this Court in *Texas* v. *New Jersey*. Such funds, when paid to New York, will be held for the benefit of the persons entitled thereto without limitation of time.

Dated: New York, New York, February 24, 1972.

Respectfully submitted,

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